

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JIMSIS, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1979	:	
through November 30, 1983.	:	

Petitioner, Jimsis, Inc., 246 East Union Street, Newark, New York 14513, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through November 30, 1983 (File No. 801159).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York, on December 3, 1987 at 9:15 A.M., with all briefs to be filed by March 29, 1988. Petitioner appeared by Martin Sanders & Company (Martin Sanders, CPA). The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether the Audit Division's denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity consumed in the operation of petitioner's supermarket was proper.

II. Whether the method used by the Audit Division to determine the amount of exempt kilowatt-hours of electricity consumed by certain equipment in petitioner's supermarket was proper.

FINDINGS OF FACT

1. During the period in issue, petitioner, Jimsis, Inc., owned and operated a grocery store in Newark, New York. The grocery store contained a meat department, produce department, and delicatessen and bakery department.

2. On or about September 29, 1980, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax on electricity and natural gas used in production at the grocery store located in Newark, New York during the period September 1, 1977 through September 1, 1980. Petitioner sought a refund of \$4,935.00 on this application, and also explained that it would seek an additional \$255.00 representing the sales tax paid related to the production of hot water if an unnamed pending case was resolved in a manner favorable to petitioner.

3. On February 21, 1984, the Audit Division advised petitioner that it had reviewed petitioner's claim for a refund of \$4,935.00, as well as the credits claimed on petitioner's sales tax returns during the period in issue of \$11,729.00, for a total of \$16,664.00. In the course of this review, the Audit Division determined that petitioner was entitled to a credit of 16.28 percent of

the amount of tax paid on its utilities. This percentage was computed by dividing total exempt kilowatt usage per year, determined by multiplying kilowatt usage per day per exempt machine by the number of days used per year, by the average total kilowatt hours consumed per year as determined by available invoices. The Audit Division then calculated the amount of credit due by multiplying 16.28 percent by the total amount of tax paid for utility service. This calculation disclosed that petitioner was entitled to a credit during the audit period of \$4,080.65. Since petitioner had claimed credits on its sales tax returns of \$11,729.00, the Audit Division concluded that there was a deficiency of sales and use tax of \$7,648.35.

4. On February 21, 1984, on the basis of the foregoing calculations, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner which, in conjunction, assessed a deficiency of sales and use taxes for the period March 1, 1979 through November 30, 1983 in the amount of \$7,648.35, plus interest of \$1,633.62, for a total amount due of \$9,281.97.

5. At a prehearing conference held after the foregoing notices were issued, the Audit Division determined that 18.77 percent of petitioner's electrical consumption was exempt from tax.

6. In support of its refund claim, petitioner submitted a document prepared by Energy & Value Consultants, Inc. which divided petitioner's equipment into three departments: meat department, produce department and delicatessen and bakery department. With respect to each department, a chart was prepared showing, among other things, the particular equipment involved, the kilowatts the particular piece of equipment used per hour, the average daily usage and the amount of kilowatts per day that the piece of equipment used. Energy & Value Consultants, Inc. computed hourly kilowatt usage using tables and data published by the National Electrical Manufacturers Association. No evidence was presented that Energy & Value Consultants, Inc. tested any of the equipment to independently ascertain the amount of electricity the equipment in question utilized.

7. When the Audit Division computed the amount of credit due petitioner, the claimed kilowatt usage per day was reduced on many of the pieces of equipment to reflect one of two formulas relied upon by the Audit Division depending upon whether the horsepower of the motor was known. If the horsepower of the motor was known, the Audit Division determined the kilowatts per hour by multiplying the horsepower by 746 and dividing the product by 1,000. If the horsepower of the motor was not known, the Audit Division calculated the kilowatts per hour by multiplying voltage by amperage and dividing by 1,000. These formulas were derived from information furnished to the Audit Division by the New York State Energy Office and the United States Department of Energy.

8. Petitioner's produce department contained a wrapper, scale/labeler, produce preparer and cooler. The wrapper and scale/labeler were used to package and prepare food for sale to the consumer. The equipment in the produce department was ostensibly used to slice and dice fruits and vegetables in order to prepare salads. The Audit Division did not allow an exemption for the power used to operate any of the equipment in the produce department.

9. The survey by Energy & Value Consultants, Inc. disclosed that petitioner's meat department contained two hot water tanks. The Audit Division disallowed a credit for the sales tax paid on the electricity claimed to be necessary to heat the hot water tanks.

10. At the hearing, petitioner's representative testified that one of petitioner's hot water

tanks was used to produce steam for the use of a proofer. A proofer, in turn, is a piece of equipment which is used to reduce the time it takes for dough to rise. Petitioner's representative asserted that an exemption should have been allowed for the gas to heat the hot water tank.

11. The survey by Energy & Value Consultants, Inc. reported that petitioner's delicatessen and bakery department contained an oven which was used 24 hours a day. The Audit Division calculated the credit due petitioner on the premise that the oven was used 15 hours a day. In the meat department, the survey reported that petitioner had two meat preparation machines and a meat cooler which were purportedly used an average of 20 hours a day. On review, the Audit Division allowed 18 hours a day for the meat preparation machines and for the meat cooler on the basis that petitioner did not substantiate that the equipment was used for a longer period of time.

SUMMARY OF PETITIONER'S POSITION

12. At the hearing, petitioner argued that it was engaged in the manufacturing of salads. Petitioner also argued that the cutting and sorting of the vegetables are part of agricultural production, helping to prepare the fruit and vegetables for final sale to the consumer. Petitioner further maintained that it was arbitrary and capricious for the Audit Division to reduce the number of hours of electrical usage of the equipment that was allowed.

CONCLUSIONS OF LAW

A. That Tax Law § 1115(c) provides for an exemption from the sales and use taxes imposed under Tax Law §§ 1105 and 1110 as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

B. That the Audit Division properly disallowed a credit for the sales tax paid on electricity to operate the equipment which was used to cut, sort and grade produce. As set forth in the study by Energy & Value Consultants, Inc., there were four items in the produce department: wrapper, scale/labeler, produce preparer and cooler. In *Matter of APOG Foods, Inc.* (State Tax Commn., October 15, 1986), it was noted that the wrapper and scale/labeler served petitioner in the distribution and selling of its product. Neither changed the nature, shape or form of the produce (see ___ 20 NYCRR 531.2[e]; cf. *Matter of J. H. Wattles, Inc.*, State Tax Commn., October 30, 1981 [which was decided pursuant to Article 9-A of the Tax Law]). Moreover, petitioner has not established that the produce cooler was used exclusively in the production, as opposed to storage, of tangible personal property (see ___ *Matter of APOG Foods, Inc.*, *supra*). Thus, petitioner has not demonstrated that the wrapper, scale/labeler and produce cooler were used in the production of tangible personal property (*Matter of Klein's Bailey Foods, Inc.*, Tax Appeals Tribunal, August 4, 1988).

C. That petitioner has not established that it is entitled to an exemption for purchases of electricity consumed by produce slicing equipment. It cannot be discerned from the record

whether the fruit so sliced was sold as a salad which would preclude an exemption (Matter of Burger King v. State Tax Commn., 51 NY2d 614) or whether the sliced fruit was sold in a state which would render the food exempt from tax (Tax Law § 1105[d]) and permit an exclusion from sales tax (Matter of Klein's Bailey Foods, Inc., supra).

D. That petitioner has not established that it is entitled to a credit for sales tax paid in connection with the heating of water. First, contrary to the explanation provided at hearing, the only hot water tanks contained in petitioner's survey were in the meat department and not the bakery department. Secondly, petitioner's survey does not show any gas consumption. Thus, in view of the unexplained discrepancy between the explanation at the hearing and petitioner's survey, petitioner has not established that it is entitled to a sales tax exemption for heating hot water. It is noted electricity to heat hot water tanks is not exempt from sales and use tax when they are used for sanitation purposes (Matter of Wehrle Drive Supermarket, State Tax Commn., December 14, 1982).

E. That petitioner has not shown that it was an error for the Audit Division to change the hours of operation of certain pieces of equipment. Petitioner has not presented any evidence which would show that the equipment was used for a greater period of time than that permitted by the Audit Division.

F. That petitioner has not established that it was an error for the Audit Division to recalculate the kilowatt-hours of exempt electrical use by the equipment in petitioner's store. There is no evidence that petitioner performed any independent tests of the amount of power consumption of its equipment. Thus, there is no evidence that the calculations in petitioner's survey were more accurate than the amounts used by the Audit Division. In sum, petitioner has not shown that the Audit Division's calculations were unreasonable or improper, nor has it established the accuracy of its own calculations (Matter of APOG Foods, Inc., supra).

G. That the Division of Taxation is directed to modify the notices of determination and demands for payment of sales and use taxes due, dated February 21, 1984, in accordance with Finding of Fact "5".

H. That the petition of Jimsis, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due, as modified (see ___ Conclusion of Law "G"), are sustained.

DATED: Albany, New York

September 9, 1988

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE